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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 629

ALGER HISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 304) [1] is reported at 201 F. 2d 372. The opinion of the District Court (R. 286-303) upon which the Court of Appeals affirmed is reported at 107 F. Supp. 128.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1953 (R. 305). The petition

[1] The Record filed with the petition for certiorari herein is designated as R. References to the Record filed with this Court during October Term, 1950, in conjunction with the petition for a writ of certiorari to review the judgment of conviction (No. 520) are designated as Tr. R.

for a writ of certiorari was filed on February 28, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court abused its discretion in dismissing petitioner's motion for a new trial on the ground of newly discovered evidence after oral argument and consideration of affidavits submitted in support and in opposition thereto, but without hearing testimony.

RULE INVOLVED

Rule 33, F. R. Crim. P. provides in pertinent part:

> The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment. * * *.

STATEMENT

Petitioner seeks review of the judgment of the court below, which affirmed *per curiam*, on the opinion of the District Court for the Southern District of New York, filed on July 22, 1952, an order denying petitioner's motion (R. 4-169) under Rule 33, F. R. Crim. P., for a new trial on the ground of newly discovered evidence.[2]

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[2] No separate order was entered because pursuant to Rule 10 of the General Rules for the District Court for the Southern District of New York, effective March 10, 1952, the opinion of the court, filed on July 22, 1952, constituted the order of the court.

In January, 1950, petitioner was convicted of perjury under an indictment in two counts charging that, before a grand jury in the Southern District of New York, petitioner had falsely testified (1) that neither he, nor his wife in his presence, had ever delivered any documents of the State Department to Whittaker Chambers and (2) that he had never seen Whittaker Chambers after January 1, 1937. See *United States* v. *Hiss,* 185 F. 2d 822 (C.A. 2), certiorari denied, 340 U.S. 948.

At the trial,[3] Chambers, the principal prosecution witness, testified that while he was a "liason man" between the American and Soviet segments of the "underground apparatus in Washington," petitioner was transferred to his organization, and that out of their cooperation in espionage activities there had developed a close friendship among them and their wives (Tr. R. 223-238, 240-264).[4] Shortly after petitioner was employed by the State Department in January 1937, he began supplying Chambers with official State Department documents (Tr. R. 253, 254-256, 257). From that time "until the middle of 1937", petitioner every week

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[3] The court's attention is called to the Government's Brief in Opposition (3-13) to petitioner's application for certiorari to review the judgment of conviction, *Alger Hiss* v. *United States of America*, No. 520, October Term, 1950, which contains a concise but comprehensive summary of the evidence.

[4] Chambers testified that from 1934 to 1938 the Chambers frequently visited the Hisses and, on occasion, lived in the latter's various Washington residences (Tr. R. 242, 243, 248, 250, 252), and the Hisses likewise visited the Chambers in the latter's residences in Baltimore and elsewhere (Tr. R. 243-245, 248, 250, 251, 262, 264, 277-279). This was corroborated by testimony of Mrs. Chambers (Tr. R. 954-1071).

or ten days took selected State Department papers to his house, where Chambers would pick them up the same day, take them to Baltimore to be photographed, and return them the same night to petitioner (Tr. R. 257-259, 277). Thereafter, in order to speed up the flow of documents, petitioner brought to his house almost nightly some State Department papers, copies of which were typed verbatim or paraphrased,[5] and every week or ten days such copies, plus the original documents brought from the office that day, would be picked up by Chambers. The latter, after photographing them, would return the original documents to petitioner, burn the typed documents, and transmit the film to the "apparatus" (Tr. R. 258-259). In addition to such documents, petitioner at times also gave Chambers "small handwritten notes" about information contained in State Department documents, and Chambers transmitted photographs of these notes to the "apparatus" (Tr. R. 259).

About the early fall of 1937, Chambers began contemplating his disassociation from the Communist Party (Tr. R. 260). He continued to receive documents from petitioner until he broke with the Party around April 15, 1938, and moved to another residence in Baltimore (Old Court Road). He remained there until he obtained certain work as a translator for the Oxford University Press in

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[5] Chambers understood that the typing entailed in copying the documents would be done by petitioner's wife, who thereby would satisfy a desire to perform "some activity for herself" in the "underground work" (Tr. R. 290, 259). However, he never saw her type any of the documents (Tr. R. 580).

New York (Tr. R. 259-261, 264-265). However, he "saved" some of the typed copies of documents, handwritten notes, and film which he had received from petitioner just before his break with the Party, and delivered them in a sealed envelope to his wife's nephew, one Levine, in New York (Tr. R. 260; see also Tr. R. 728). Levine placed the envelope in an unused dumbwaiter, where it remained until late 1948, when Chambers took its contents for use in a libel suit instituted against him by petitioner (Tr. R. 290-292; see also Tr. R. 727-729).

Chambers' foregoing testimony was corroborated principally by the contents of the envelope kept by Levine which were admitted in evidence. The Government's "Baltimore" [6] Exhibits 1-4 (Tr. R. 299, 3433-3440) were four handwritten memoranda, which petitioner conceded at the trial were in his handwriting (Tr. R. 1073; see also Tr. R. 53, 1833). They consisted of summaries of the contents of four cablegrams which came to the State Department in January and March 1938.[7]

The Government's "Baltimore" Exhibits 5-9 and 11-47 (Tr. R. 299, 3441-3444, 3447-3520) consisted of 43 typewritten pages of copied, extracted or condensed material from official State Depart-

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[6] So called because they were originally received in evidence in connection with the libel suit instituted by petitioner against Chambers in the United States District Court for the District of Maryland, at Baltimore, in September 1948 (see Tr. R. 298, 290-293, 2448).

[7] The Government's "State" Exhibits 1-4 (Tr. R. 761-764, 3535-3542) were the "underlying" State Department documents, i.e., the four cablegrams themselves.

ment documents.[8] Through its expert, Feehan, the Government established that all of the typewritten "Baltimore" exhibits were the products of some Woodstock typewriter, which was also used for typing certain standards admittedly typed on a typewriter owned by the Hisses ("Hiss Standards") (Tr. R. 1074-1075, 1106; Gov. Exs. 34, 37, 39, 46; Tr. R. 700, 705, 707, 742, 3345-3346, 3351, 3355-3356, 3373-3374).[9]

As part of his defense, petitioner introduced into evidence a Woodstock typewriter serial No. N230,-099 (Def. Ex. UUU; Tr. R. 1559, 3799), identified as one which had been given to Mrs. Hiss by her father around 1933, and which she had given to one of her maid's children around December, 1937 (Tr. R. 1914-1915, 1917, 1978-1979, 2282, 2344-2347, 2349, 2350-2351, 2324, 1850, 1885, 1717-1720, 1584-1600, 1556-1559).[10]

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[8] The Government's "State" Exhibits 5-9 and 11-47 (Tr. R. 765, 767, 790-824, 3543-3546, 3549-3630) were the "underlying" State Department documents, which bore dates indicating that they were received or prepared in the State Department between January 5 and April 1, 1938. There was evidence that Hiss had access to these documents in the State Department (Tr. R. 765, 767, 790-824).

[9] Feehan's conclusion was based on his study of all characteristics of the documents involved (Tr. R. 1080-1081). However, he demonstrated to the jury only "some" identical characteristics found in both the Baltimore documents and the Hiss standards upon which he based his conclusion that both sets of documents were the products of the same typewriter (Tr. R. 1075-1081).

[10] Petitioner's wife also testified that she had typed on the Woodstock machine all four of the "Hiss Standards" (Tr. R. 2343, 2347). And both the defense and the Government accepted the typewriter in evidence as the one which also produced the "Baltimore" documents (Tr. R. 195, 201, 3144, 3162, 3253).

In rebuttal of testimony of petitioner and his wife (Tr. R. 1853, 2039, 2381) that they had never visited the Chambers in Baltimore or anywhere else, Edith Murray, a former maid of the Chambers, testified for the Government that she had seen both petitioner and his wife at Baltimore residences of the Chambers on several occasions in 1935 or 1936 (Tr. R. 3024-3027, 3032).

Petitioner's motion for a new trial and supporting affidavits alleged that newly discovered evidence tended to prove (1) that a typewriter with characteristics similar to those by which the Baltimore documents were identified as having been made on the Hiss typewriter could have been fabricated; (2) that the typewriter which petitioner introduced as the one at his home in 1937, and which was accepted by the government as the source of the "Hiss standards" and the Baltimore documents, was not in fact the Hiss typewriter; (3) that Chambers had left the Communist Party before the date of the last of the Baltimore papers and could not have received them, and (4) that Edith Murray had not been employed by the Chambers at the places mentioned in her testimony (R. 3-169).

The newly discovered evidence offered by petitioner and the Government's counter-affidavits with respect thereto may be summarized as follows:

1. *Possibility of the Fabrication of a Typewriter:*—Martin Tytell, an expert experienced "in the creation of unique typewriters for foreign language and other purposes", was asked to create, from samples of typewriting, a new machine which

would duplicate in type defects, alignment, and all other respects that a document expert would consider pertinent, the machine from which the samples were taken. After experimenting for a year and a half or two years, during which the results were checked by comparison of samples by a document expert, he produced a machine which the document expert found still lacked "the highest degree of accuracy" (R. 18-20, 54-55, 56-59). The document expert testified that she could "distinguish between the products of the two machines", but that, in her opinion, any document expert not suspecting "that a deliberate attempt at duplication of machines had been made, would be deceived into thinking that all the samples were made on a single machine" (R. 58-59, 148-149).[11]

However, Evelyn Ehrlich, an expert in "the detection of spurious prints", in the course of her examination, at petitioner's request, of two different groups of unmarked samples from both the typewriter fabricated by Tytell and the Woodstock admitted in evidence (serial #N230,099), "successfully differentiated the typing of the two machines" (R. 60-62, 155). As a result of another experiment, she formed the "opinion" that any reasonably careful document expert, applying the criteria used by Feehan "in demonstrating to the jury his conclusion that the Baltimore documents and the Hiss standards had been typed on the same machine",

[11] She admitted, however, that she had "no way of knowing how far" the experts might also be successful in making the same distinction as she had done between the products of the two machines (R. 148).

would conclude "that a single machine had been used to type all" the samples used in her test, because the two machines contained "many more similar deviations than the ten which Mr. Feehan described to justify his testimony at the trial" (R. 62-64, 156).

The government pointed out that petitioner's not wholly successful experiment provided no explanation of how Chambers could have obtained samples of typing or could have had the opportunity or time to engage in the long experimentation described by petitioner. Also, the Government offered the affidavit of Feehan, who explained that, in being asked at the trial to demonstrate "some" of the characteristics used as a basis for his conclusion that the Baltimore documents and the Hiss standards were the products of the same typewriter, he selected ten letters which appeared "many times" in those documents. Feehan stated that his laboratory examination and the resulting conclusion were based upon the test he made in the F.B.I. laboratory, where he "examined and compared each typewritten character appearing on the Baltimore documents #5 through #9 and #11 through #47 with the known standards, taking into consideration style of type, alignment, horizontal and vertical spacing, footing, variations and defects", and found "no unexplainable differences existing in the typewritten characters on the questioned and known documents, nor * * * any evidence that more than one typewriter was used". (R. 210-211.)

2. *The Fabrication of the Typewriter Offered in Evidence:—*

The typewriter on which the "Hiss standards" were admittedly written had been given to Mrs. Hiss by her father. An expert, who examined the correspondence of the father's firm, concluded that by July 8, 1929, that firm had acquired a Woodstock similar in typeface pattern to the Hiss typewriter (R. 81-83).[12]

a. Petitioner sought to establish that Woodstock No. 230,099 (the number of the machine in evidence) was not manufactured till some later date. He succeeded in obtaining from two officials of R. C. Allen Business Machines, Inc., a successor to the Woodstock Typewriter Company, conflicting statements concerning the possible dates of the manufacture of Woodstock No. 230,099. A vice-president of the company stated in an affidavit (R. 68), which he later retracted (Pet. p. 16, fn. 10), that from the records which the company had, "typewriter No. 222,402 was built in March or April, 1929 and serial No. 230,000 was built in April or May 1929" (R. 68). The company's factory manager, Schmitt, indicated that Woodstock No. 230,099 "was built approximately in July or

[12] Since that expert had only photostats of photostats of the "Hiss standards", he would not express a positive opinion that they were written on the same typewriter. He did say that a comparison of the individual typeface characteristics in the Northwestern Life Insurance typewritings dated July 8, 1929, and after, with the Baltimore Letters and Standard Hiss specimens, showed a tendency in the 1929-1930 Northwestern Life Insurance specimens toward the development of typeface defects that later became so highly identifying in the 1933 and 1935 specimens and the Baltimore Letters (R. 84-90).

August 1929", but refused to verify his statement under oath (R. 69-72). Petitioner's attorney, using certain production statistics and approximate dates of the assignment of certain serial numbers to manufactured typewriters, obtained from the manufacturer's records, made a computation, on an average basis, from which he concluded that at best Woodstock No. 230,099 could not have been manufactured before July 3, 1929 (R. 73-74).

The government's opposing affidavit pointed out that the figures submitted by petitioner reveal "how totally incomplete and unreliable they are as the bases of further conclusions", over 13,000 serial numbers having been skipped in that one year with no apparent reason (R. 190). On petitioner's own view of the figures, No. 230,099 could have been produced in June, 1929 (*ibid.*)

b. Petitioner also employed an industrial chemist, Norman, to make a comparison of No. 230,099 with other Woodstock machines manufactured prior and subsequent thereto. He found that No. 230,099 differed from comparison machines in that (1) the solder holding the type to the typebars contained more nickel and had not been filed flat; (2) the types were not all made from the same batch of metal and (3) there were three "abnormal tool marks", "outstandingly so on the small letter 't' ", indicating mechanical alterations. On the basis of these observations, Norman concluded that the soldering of the type to the typebars on Woodstock No. 230,099 was not made at the Woodstock factory or by a professional repairman and that

the typewriter was not one "which has worn normally since leaving the factory, but shows positive signs of having been deliberately altered, in that many of its types are replacements of the originals and have been deliberately shaped" (R. 123-133).

On the other hand, both Otto Hokanson, a superintendant of the Woodstock Typewriter Company plant at Woodstock, Illinois, from 1925 until the middle of 1929, and Conrad Youngberg, who followed him as superintendent [13] from 1929 to 1933, stated in their affidavits that the process of soldering was such that there was "considerable variation in the amount of solder left on the ends of the bars"; that no nickel was intentionally used in solder although the typebar was nickel plated at the end of the operation (R. 226-229). Thus, as the government pointed out, variations in the amount of nickel would result from the amount of nickel plate taken off with the underlying solder and, if there were alterations, less nickel would be found since it was unlikely that the altered typebar would be nickel plated anew (R. 193). The superintendents' affidavits also stated that the stockpile of type from which type was drawn for soldering to the bars varied monthly and therefore the type used on a particular machine "could have been made from two different batches of steel"; that no change in dies for the letter "t" had been made at

[13] Youngberg, who was previously Assistant Superintendent at Woodstock "designed and set into operation the process for soldering type to type-bars, which process was in operation in 1929" (R. 226).

the plant in 1929; that the samples of letter "t" used by Norman in his comparison of other Woodstock models with No. 230,099 were not products of Woodstock; that it would have been extremely difficult to change the curvature of the letter "t" without the type face bearing marked evidence of alteration by mechanical means"; and finally that the appearance of the type did not indicate any alteration thereof other than that caused by "mere abnormal use of the typewriter" (R. 227-229).

3. *The falsification of the Baltimore documents:*

a. Norman, after examination of the paper of the Baltimore documents, noted that of the two sizes used the larger sheets were more heavily yellowed than the smaller, although of the same general class of paper, and concluded that "they could not have been stored together under the same atmospheric conditions for most of their existence." (R. 164-166).[14]

The government expert pointed out that the effects of age in the "Baltimore" papers [15] could not be expected to be uniform across their surfaces because they "were obviously folded in fourths for a

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[14] Norman also noted that the "Baltimore" documents showed no stains or pressure marks which would have inevitably resulted if they had been enclosed in an envelope for a period of 10 years (R. 166-167).

[15] An analysis of white paint splatterings from the dumbwaiter shaft in Levine's house with those appearing on the envelope in which the documents were enclosed showed them "to be of the same color, texture and composition" (R. 222, 220).

considerable period of time," [16] and that "the inference that papers of the same general class will show the same aging characteristics is without foundation" because aging characteristics differ with "variations in such constituents as rosin (sizing material), iron, lignin and bleaching" (R. 217-218). The government also pointed out that there was no proof of the age of each type of paper when typed (R. 191-192).

b. Norman also concluded that there was an alternation in the use of several typewriter ribbons in typing the Baltimore documents because, "in a number of instances two documents dated some time apart are typed with a ribbon of a given thread count while other documents with dates in between are typed with a ribbon of a different count" (R. 168).

The government pointed out that there was no claim that the Baltimore papers were typed in the same time order as the dates of the documents (R. 193). Its expert stated that, even assuming that "it were possible to make an accurate thread count of each and every letter of the Baltimore Documents, a difference in thread count would not justify a statement that" several ribbons were used in typing those documents, because even according to federal specifications "it is permissible for grade A cotton ribbons to have a variation of five threads per inch in either the vertical or horizontal threads" (R. 219-220).

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[16] The aging characteristics were so obvious as to permit the arranging and folding in the manner in which they were stored (R. 217).

c. Petitioner's expert, McCarthy, who participated in the typewriter fabrication experiment, concluded that the Baltimore documents were not the work of one typist, that petitioner's wife did not type them (R. 151-152), and that the pencil corrections appeared to have been made at one time (R. 153-154).

The government expert noted that it was almost impossible to identify an "inexperienced typist who is copying documents and obviously influenced by the form of the source material" (R. 213), and that the writing characteristics evidenced by the few brief pencil markings are insufficient for accurate or valuable conclusions (R. 214-215). The government also pointed out that, while Chambers testified that he understood that petitioner's wife typed the documents, he also stated that he had not seen the typist (R. 185, see Tr. R. 580).

4. *Chambers' breach with the Communist Party:* —Petitioner, interpreting Chambers' testimony to be that the latter's breach with the Party was contingent upon his receipt of certain translation work, produced evidence tending to show that Chambers actually obtained such work from the Oxford University Press before March 18, 1938 (R. 119-121). There was also produced a letter from Chambers to the publisher dated May 3, 1938, in which he explained the non-receipt of communications dated April 12 and 18 (R. 100-102) by saying that he had not been at his Mt. Royal Terrace apartment [in Baltimore] for more than a month

(R. 104). Petitioner concluded that the Chambers break from the party must have come by March 18, and that he therefore could not have received from petitioner the later-dated documents, the last of which is dated April 1, 1938 (R. 41-48, 108-110).

The government pointed out that an error by Chambers as to the date when he received translation work would not necessarily prove an error as to the date when he broke with the Communist Party and left his Mount Royal Terrace apartment (R. 204-205). An affidavit from an official of a utilities company showed that the Chambers had paid for their gas and electric service at the Mount Royal Terrace address until April 9, 1938, and that, on April 12, 1938, Mrs. Chambers ordered the furnishing of gas and electric service for a room in a house on Old Court Road, Baltimore, after prior tenants of that room had discontinued such service on April 4, 1938 (R. 236-238).[17]

5. *The Testimony of Edith Murray:*—In support of petitioner's claim that Edith Murray had never seen him in any of the Chambers' Baltimore residences during 1935 and 1936 (see *supra*, p. 7), petitioner submitted two affidavits of persons who stated that they had never seen a colored maid in the employ of the Chambers (R. 90-95).

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[17] On April 1, 1938, Mrs. Chambers took the family car for some servicing, the nature of which would indicate that a trip was contemplated (R. 240-241). On April 2, 1938, from the Mount Royal residence, she addressed a letter concerning her child, to a local school (R. 242-243). A week later, she addressed another letter to the school from Lynbrook, New York, stating that she would call at the school in a few days (R. 244).

William Fowler, while cautioning that he did not "remember names very well," stated that "three to five times a week," during the period 1934-1935, he and his wife were guests of the latter's aunt, a housekeeper, at the address on St. Paul Street, Baltimore, where the Chambers were supposed to have lived in 1935, but he did not remember anyone by the name of Chambers or Cantwell (Chambers' alias) living there (R. 91-92). Moreover, he was "absolutely positive" that no maid had ever been employed by any tenants there during that period (R. 93).

To the contrary, Fowler's estranged wife stated that "until approximately eight months" after their marriage, she and Fowler visited at the St. Paul Street residence "not more than once every three weeks," and she recalled that on one such visit she heard her aunt state "that a family named Cantwell had resided" there (R. 233-234).

Louis Leisman stated that from September 1935 to December 1936, he had been custodian of the building adjoining the residence on Eutaw Place, Baltimore, where the Chambers lived from October 2, 1935 to June 27, 1938 (R. 234-235), that, although he had spent much of his time "on the front steps" of his building, he never knew the Chambers to have a maid (R. 94). He added that the neighborhood consisted of a "very low type white people," that because it would have been an uncommon situation, he would have inevitably heard some comment if any neighbors had employed a maid, and that because of the unsavory

reputation in the neighborhood he would have made some inquiry if he had noticed a colored girl entering the premises (R. 95).

The United States Attorney stated in his affidavit that, the Government had been advised by "three independent and reliable witnesses" that in fact Mr. Leisman was not employed at the Eutaw Place house at the period in question; that he had been employed there in the early part of 1935 but had been fired for drinking (R. 202).

The District Court, after a full consideration of the affidavits submitted in support of petitioner's motion, following oral argument on both sides, but without personally hearing the affiants of the supporting affidavits, found that, "There is no newly discovered evidence which would justify the conclusion that if it were presented to a jury, it would probably result in a verdict of acquittal" (R. 286-303).

ARGUMENT

A mere reading of the careful opinion of the district court, on which the Court of Appeals was content to rely, is a sufficient refutation of petitioner's argument that the district court abused its discretion and applied improper standards in denying his motion for a new trial. Petitioner's affidavits, to the extent that they are not based on pure speculation, are so inherently weak and so thoroughly refuted by the Government, that it was entirely proper to deny the motion on affidavits alone.[18] *United States* v. *Johnson*, 327 U.S. 106, 109; *Harri-*

[18] It should be noted that the alleged newly discovered evidence, upon which petitioner's motion for a new trial was predi-

son v. *United States*, 191 F. 2d 874 (C.A. 5); *United States* v. *Forzano*, 190 F. 2d 687 (C.A. 2); *United States* v. *Cordo*, 186 F. 2d 144 (C.A. 2), certiorari denied, 340 U.S. 952.

1. *Fabrication of the Typewriter by Chambers.*—The district court properly concluded that petitioner's supposition "that Chambers constructed the alleged duplicate typewriter from the typewritten characters in the Hiss letters, or that it was done for him by some Communist friends," is based solely upon "conjecture with absolutely no evidence to support it" (R. 296). Not only was the year and a half experiment on petitioner's behalf not wholly successful, but there was absolutely no evidence that Chambers had specimens to work from, or that he had the personal ability to construct such a typewriter or sufficient time in which to do so, or that he had the assistance of experts

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cated, related specifically to Chambers' direct testimony in support of the perjury charge in count one of the indictment and, particularly, to the documentary evidence corroborative of such testimony, other than the handwritten notes as to which no new evidence was offered (see opinion at R. 297). The proof upon which petitioner's conviction under count two was based was not dependent upon the same evidence but, instead, consisted of Chambers' other testimony, which was substantially corroborated by his wife's testimony (Tr. R. 954-1071) to the extent that it related to the friendly and social relationship which had existed between the Chambers and the Hisses between 1937 and 1938. Therefore, as petitioner expressly recognizes (Pet. p. 4, fn. 2; p. 6, fn. 5), his motion, and the petition herein have been necessarily limited to the charge contained in count one of the indictment. Petitioner endeavors to extend the scope of the motion by stating that it was "in effect conceded by the Government and by the courts below that if evidence warranting a new trial under Count I were produced the conviction under Count II could not stand" Pet. p. 4, fn. 2; p. 6, fn. 5). Neither the Government nor the courts below have made such a concession.

to create it, or that he had the knowledge which would enable him to plant it where petitioner would find it (see opinion at R. 296-297).

As the district court also pointed out (R. 297) "The defense reasoning that #230,099 was manufactured after the Hiss machine is not sustained by any proof. Their theory is based wholly upon incomplete records from which they have drawn speculations from approximate dates of manufacture."

The bases of the opinion as to fabrication by petitioner's expert, Norman, were completely demolished by the affidavits of the superintendents of the Woodstock plant (see Statement, *supra*, pp. 10-13). The district court was clearly correct in holding that "In the absence of any proof and in view of the many improbabilities in the theory of the defense, a jury could not reasonably find that Chambers constructed a duplicate typewriter or that #230,099 is not the Hiss machine" (R. 297).

2. *Falsification of the "Baltimore" documents.*—The Government rested its case upon the evidence that the "Baltimore" documents and the Hiss standards were typed on a single typewriter, without identifying the machine. Thus, in order to have any value, petitioner's evidence had to show that the Baltimore documents were forged, even if he could show that No. 230,099 was not his machine. Petitioner has offered no evidence showing that the "Baltimore" documents and the Hiss standards were not the products of one machine. His experts admittedly could not distinguish between these two sets of documents, although they were able to dis-

tinguish between products of No. 230,099 and the experimental machine. His expert, McCarthy, though willing to believe that a forgery has taken place, admits that she cannot detect it. (R. 58, 60-62, 155, 84-90, 157-161.)

With respect to the evidence of the identity of the typist of the "Baltimore" documents, it is not only inconclusive, but totally irrelevant. The Government's case in no way turned upon such identity, for, although Chambers testified that petitioner told him his wife would be the typist, he also testified that he did not recollect seeing anyone type the documents (see Statement, *supra*, p. 4, fn. 5).

The purported new evidence concerning the condition and storage of the documents was, as the district court count pointed out, evidence which could have been available at the trial (R. 294) and was in any event, completely refuted by the Government (see Statement, *supra*, pp. 13-14, and opinion at R. 293).

3. *Chambers' breach with the Communist Party:* —Chambers did not fix the time of his withdrawal from the Party as contemporaneous with the time of his receipt of translation work. He fixed the time of the break as the time of his removal from Mt. Royal Terrace to Old Court Road, and his receipt of the translation work as the time of his departure from Old Court Road (Tr. R. 259-265). Hence, as the district court pointed out (R. 300-301) if he erred as to the time of the translation work, the error goes merely to a collateral issue and does not prove that Chambers had left the party before April 1. The utility records offered by the government (see Statement, *supra*, p. 16)

show that Old Court Road had been occupied by another tenant until April 4, 1938, and that Chambers had not ordered the utilities connected until April 12, 1938.

4. *Rebuttal witness:*—As to petitioner's attempt to discredit the testimony of Edith Murray, Chambers' maid, the District Court stated that "This evidence is neither convincing nor conclusive for the opportunities of Fowler and Leisman to observe Murray were limited", and that "there is no indication that the defendant or his lawyers made any effort to elicit this information and offer it at the trial—no request for an adjournment or continuance was requested at the time—and the facts do not justify the inference that this information was sought with due diligence" (R. 299). Moreover, the Government presented facts seriously impeaching the credibility of both (see Statement, *supra*, pp. 17-18).

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question warranting further review by this Court. It is therefore respectfully submitted that the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 629

ALGER HISS,

Petitioner,

against

UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONER

CHESTER T. LANE,
ROBERT M. BENJAMIN,
WALTER E. BEER, JR.,
HELEN L. BUTTENWIESER,
Counsel for Petitioner.

April, 1953.

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REPLY BRIEF OF PETITIONER

Ordinarily we should hesitate to burden the Court with even a short reply brief on a petition for certiorari—particularly a reply brief dealing principally with disputes of fact. But we know that through long experience the Court has come to rely on the Government for high standards of fairness, accuracy, and completeness in the statement of the pertinent facts, and we fear that failure to reply would be taken as acquiescence in the assumption that those standards have been adhered to in this case. They have not. The Government's plausible statement in its brief in opposition contains so many plain errors and misleading inferences or omissions that it wholly distorts the presentation of which petitioner has been trying, unsuccessfully, to secure judicial consideration.

As in our petition for a writ, we cannot undertake to detail the inaccuracies in the Government's brief. We can only illustrate.

1. For instance, the Government does not question the importance of proof—if there be such—that Woodstock No. 230,099 was not manufactured at least until July, 1929.

But the Government depreciates the proof offered, by referring to "conflicting statements" of Woodstock officials, by categorizing the computations of petitioner's attorney as having been made "on an average basis"—as if somehow that made them seem unreliable—and by stating that: "On petitioner's own view of the figures, No. 230,099 could have been produced in June, 1929" (Br. 10-11).

The only conflict between Woodstock officials was between an affidavit of one Carlson, and the actual Woodstock records which Carlson later joined with Schmitt in producing for inspection. When he examined the records, Carlson repudiated his affidavit, saying that it had been prepared for him by an unnamed clerk. Once the records were produced there was no conflict as to their meaning.[1]

As to petitioner's attorney's computations having been made "on an average basis", the statement is completely unfounded in so far as it relates to the demonstration that No. 230,099 could not have been made before the first week in July, 1929. The records showed the serial numbers at the beginning and end of the year, and the exact number of machines produced each month. From this the earliest month in which a machine could have been produced can be determined with mathematical certainty. That month was July.[2]

Finally, the Government would damn petitioner's evidence by the statement that "on petitioner's own view of the

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[1] The Government does concede (Br. 10) that the affidavit was "later retracted", but it leaves the implication that there still remained a conflict. The trial judge did not even note the retraction; he relied indefensibly on the affidavit as controverting petitioner's proof.

[2] Some serial numbers were skipped, as the Government points out (Br. 11); but the determination that July was the earliest possible month was based on an assumption that all the skipping was done at the time most detrimental to petitioner's position. Lacking that assumption the machine would have had to be made even later (see R. 74a).

figures, No. 230,099 could have been produced in June, 1929". This statement is wholly unfounded. The supporting citation is to a similar statement in the trial court by the United States Attorney, who in turn referred to paragraph 6 of petitioner's attorney's memorandum of computations (Ex. IID, R. 74a). The United States Attorney simply misread the paragraph to which he referred, and his error is copied uncritically by the Government in this Court.

2. As regards the evidence inherent in the Baltimore Documents themselves that they are forgeries, the Government's most telling argument (Br. 21) is that this evidence "could have been available at the trial". Here again, the statement is wholly unsupported by anything in the record except the trial judge's similar unwarranted statement in his opinion (R. 294a). Attempts to secure access to the Baltimore Documents for physical analysis were continually frustrated by Government opposition before, during, and after the trial, and succeeded at last only on March 21, 1952 (see R. 117a-119a, 137a-139a, Pet. 13-14).

3. Of the Government's studied omission of any reference to such matters as the typing specimens submitted to the trial court in proof that a machine can be fabricated, and to the testimony of Paul Willert that when Chambers got the translation he was already out of the Party, we need say no more than was said in our petition with respect to similar omissions in the trial judge's opinion (Pet. 14-16).[3]

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[3] A point is made by the Government (Br. 18, n. 18) that the evidence on this motion affects only Count I of the indictment, and that the Government does not concede that if a new trial were granted on Count I, the conviction on Count II could not stand. We stated in our petition (Pet. 4, n. 2; 6, n. 5) that this had been "in effect conceded by the Government and by the courts below"; we based this statement on the fact that though the United States Attorney made the point about Count II in the trial court, the trial judge rejected it *sub silentio* and it was not renewed in the Govern-

These are among the more palpable inadequacies in the Government's presentation of the case to this Court. On a hearing on the merits we should develop innumerable others. In citing these few in support of our petition we are not undertaking a premature battle on the merits; we are simply seeking to emphasize the atmosphere of prejudgment and lack of fair presentation and consideration which has so far enveloped our efforts to bring out the truth in this case. Again we urge the need of review by this Court to ensure that the judicial process shall live up to its responsibilities in a case which so deeply affects our national morale.

Respectfully submitted,

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April, 1953.

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ment's brief on appeal. Regardless of concessions, it seems clear that Count II could not stand; for the trial court charged the jury that if they found Hiss guilty on Count I they should also find him guilty on Count II (Tr. R. 3275), and it must therefore be assumed that the jury did not necessarily consider any of the separate evidence under Count II. See *Stromberg* v. *California*, 283 U. S. 359. Less technically, it may be suggested that if the jury found that Chambers had forged the Baltimore Documents, the possibility of their nevertheless convicting Hiss on the ground of his having seen the Chamberses on one or two social occasions after January 1, 1937, is so remote that it could scarcely be seriously considered.